Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
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	)	
MCI WORLDCOM, INC.	)	CC Docket No. 00-45
	)	
	)	
Petition for Expedited Declaratory Ruling Regarding the Process for Adoption of Agreements Pursuant to Section 252(i) of the Communications Act and Section 51.809 of the Commission's Rules	)	

ORIGINAL

REPLY COMMENTS OF AT&T CORP.

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Pursuant to the Commission's Public Notice,[1] AT&T Corp. ("AT&T") hereby submits its reply comments in support of MCI WorldCom Communications, Inc.'s ("MCIW") Petition.[2]

INTRODUCTION AND SUMMARY

Both the incumbent LECs' persistent refusal to accommodate legitimate opt-in requests and the lack of expedited processes to enforce the requirements of § 252(i) are well documented

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[1] Public Notice, *Pleading Cycle Established for Comments on the Revised Petition of MCI WorldCom, Inc. for Declaratory Ruling Regarding the Process for Adoption of Agreements Pursuant to Section 252(i) of the Communications Act and Section 51.809 of the Commission's Rules*, DA 00-592, CC Docket No. 00-45 (2000) ("Public Notice").

[2] Revised Petition of MCI WorldCom, Inc., *Petition for Expedited Declaratory Ruling Regarding the Process for Adoption of Agreements Pursuant to Section 252(i) of the Communications Act and Section 51.809 of the Commission's Rules*, CC Docket No. 00-45 (2000) ("Petition").

by the commenters.[3] The comments likewise confirm that uncertainty regarding the nature and scope of § 252(i) requirements is producing wildly inconsistent – and long delayed – outcomes that encourage further incumbent LEC abuses.[4] There is, accordingly, widespread support for a declaration by the Commission that clarifies the incumbent LECs' § 252(i) obligations and state and federal regulators' roles in enforcing those obligations.[5]

In particular, the Commission should clarify that an incumbent LEC may not insist that a requesting carrier obtain state commission approval of a decision to opt into terms of a previously-approved agreement, and that an incumbent may object to a § 252(i) request only if it would be technically infeasible, or cost significantly more, to serve the requesting carrier. The Commission should clarify its rules to facilitate expedited dispute resolution before the state commissions and, as necessary, before the Commission. And the Commission should reduce

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[3] *See, e.g.*, Comments of Airtouch Paging ("Airtouch Paging"); Joint Comments of Focal Communications, Corp., Level 3 Communications Corp, LLC, MPOWER Communications Corp., Adelphia Business Solutions and Core Comm LTD ("Focal"); Comments of Global Naps, Inc. and Universal Telecom, Inc. ("Global NAPS"); Comments of Advanced Telecom Group et al. ("Advanced Telecom"); Comments of the Personal Communications Industry Association ("Personal Communications"); Comments of the Competitive Telecommunications Association ("CTA"); Comments of the Telecommunications Resellers Association ("TRA"); Joint Comments of Connect Communications Corp., PacWest Telecomm, Inc., GlobalCom, Inc., and RCN Corp. ("Connect"); Comments of Williams Local Network, Inc. ("Williams"); Joint Comments of Broadspan Communications, Inc. d/b/a, Primary Network Communications, Inc., @LINK Networks, Inc. and DSL.NET, Inc. ("Broadspan"); Comments of Voicestream Wireless Corp. ("Voicestream"), *Petition for Expedited Declaratory Ruling Regarding the Process for Adoption of Agreements Pursuant to Section 252(i) of the Communications Act and Section 51.809 of the Commission's Rules*, CC Docket No. 00-45 (2000).

[4] *See, e.g.*, Airtouch Paging at 6-10 (list of inconsistent state commission application of § 252(i) requests); Advanced Telecom at 7-9; Global NAPS at 2-4; Connect at 2-4; Focal at 5-6; CTA at 3-4; TRA at 5-7; Williams at 3; Voicestream at 4-5.

[5] *See, e.g.*, Airtouch Paging; Focal; Global NAPS; Advanced Telecom; Personal Communications; CTA; TRA; Connect; Williams; Broadspan; Voicestream.

incumbent LEC incentives to raise meritless objections to pick-and-choose requests by clarifying that an incumbent LEC that challenges a requesting carrier's right to opt into particular terms (i) must comply with the remainder of the requested terms during dispute resolution and, (ii) if the challenge is unsuccessful, must, at the requesting carrier's election, deem the challenged terms effective as of the date of the § 252(i) notice.

As the beneficiaries of delay, uncertainty, and inconsistency, the incumbent LECs defend the *status quo*. Because the clarification requested by MCIW is plainly consistent with the Act and its pro-competitive purposes, however, the incumbents focus their comments on attempts to dissuade the Commission from reaching the merits of the MCIW requests.

Thus, incumbents contend that "the current system does not produce any significant delay."[6] The comments, which catalogue the significant and pervasive difficulties and delay new entrants face in exercising their § 252(i) rights, prove otherwise. The incumbents claim that the Petition is procedurally improper because MCIW seeks "new" rules, not mere clarification. In fact, each request seeks clarification of an existing Commission rule; in any event, the Commission has provided ample notice and opportunity to comment to justify additions or modifications to its rules.[7]

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[6] Opposition of GTE, *Petition for Expedited Declaratory Ruling Regarding the Process for Adoption of Agreements Pursuant to Section 252(i) of the Communications Act and Section 51.809 of the Commission's Rules*, CC Docket No. 00-45, at 3 (2000) ("GTE").

[7] SBC Communications claims, without any citation, that it is somehow improper for the Commission to proceed via a Declaratory Ruling. In particular, SBC claims that MCI's petition in fact requests "a significant *change* of law" and that the Commission must therefore proceed via notice and comment rulemaking. Comments of SBC Communications Inc. ("SBC"). This claim is frivolous. It is well established that an agency has broad discretion "whether to proceed by rulemaking or adjudication . . . regardless of whether the decision may affect [existing] agency policy." *Chisolm* v. *FCC*, 538 F.2d 349, 364-65 (D.C. Cir. 1976) (rejecting claim that Commission was required to proceed via "notice and comment rulemaking" because it was

The incumbents argue that delay is inevitable in *some* situations where immediate implementation of the terms of an opt-in agreement is impractical due to unforeseen technical issues. Such problems can occur with some negotiated and arbitrated agreements as well, but that is hardly an excuse for refusing to address anticompetitive incumbent LEC pick-and-choose practices designed to ensure delay in *all* situations. Finally, the incumbents (and a few state commissions) claim that clarifying the opt-in rules to reduce delay would needlessly usurp state authority. To the contrary, the Act itself makes clear that requesting carriers need not obtain state commission approval to exercise their § 252(i) rights, and no commenter offers any legitimate justification for opposing procedures designed to ensure expeditious dispute resolution that is consistent with the requirements of the Act and the Commission's rules.

As the majority of the comments reveal, it is critically important that the Commission clearly state and adhere to bright-line rules regarding the scope, timing and enforcement of § 252(i) requests to opt into existing agreements.

I. IMMEDIATE COMMISSION ACTION IS URGENTLY NEEDED TO COMBAT WIDESPREAD INCUMBENT LEC PICK-AND-CHOOSE ABUSES.

The comments confirm that MCIW's pick-and-choose experience is no anomaly. Rather, carriers of all sizes and in all areas of the country continue to face numerous obstacles and unreasonable delay when they attempt to opt into existing interconnection agreements.

"reversing precedent which had been followed for more than a decade"). Indeed, where, as here, an agency has provided notice to the public and has received (and will consider) numerous comments, it is irrelevant whether the agency engaged in the "empty formality" of attaching a "different label" to its proceeding. *Chisolm*, 538 F.2d at 365; *New York State Comm'n on Cable TV* v. *FCC*, 749 F.2d 804, 815 (D.C. Cir. 1984) ("to remand solely because the Commission labeled the action a declaratory ruling would be to engage in an empty formality").

GTE, for example, regularly demands that competitive LECs agree to additional terms and "clarifications" in adopted agreements.[8] U S WEST requires competitive LECs to agree to changes to previously approved agreements – a tactic that often results in renegotiation or arbitration of those agreements.[9] SBC delays the adoption of previously approved agreements by requiring competitive LECs that seek to opt into more than one agreement to engage in "some negotiation" with SBC before the request will be granted.[10]

Bell Atlantic has simply refused to respond to opt-in requests submitted by competitive LECs. For example, Bell Atlantic did not respond to a Sprint request to opt into an existing agreement for almost four weeks – and then requested new language for the contract.[11] And, Ameritech has successfully delayed implementation of opt-in requests by six months or more by

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[8] *See* Global NAPS at 5 (GTE would not honor opt-in request of previously approved contract unless competitive LEC agreed to additional terms and clarifications); AT&T, at 5-6 (GTE stonewalled a MediaOne opt-in request on the grounds that renegotiation was required because MediaOne globally replaced the name of the competitive LEC in the agreement from Time Warner to MediaOne, replaced the Time Warner employee contacts with MediaOne employee contacts, and deleted a single reference to a type of system that MediaOne does not use).

[9] *See* Advanced Telecom at 14 (U S WEST denied a competitive LECs' request to opt into a previously approved document on the grounds that the opt-in requirement only applies where a competitive LEC adopts the previously approved agreement "in its entirety"); Global NAPS at 5 (U S WEST insisted upon changing the definition of "local traffic" in a previously approved interconnection agreement; resolution of this issue delayed adoption of the agreement by 6 months); Focal Communications at 10 (U S WEST insisted that Level 3 sign an additional agreement clarifying the definition of the term "local traffic"); AT&T at 5 (U S WEST will not honor opt-in requests for previously approved agreements that are more than 6 months old or where the provisions in the requested agreement will expire in less than one year).

[10] *See* Advanced Telecom at 13-14.

[11] *See* Focal Communications at 8 (citing examples where Bell Atlantic failed to respond to opt-in requests from Sprint).

requiring that a LEC first agree to clarifying language,[12] a practice that some state commissions have criticized but others have failed to discourage. As the Indiana Commission has explained, it

> continues to receive complaints from CLECs that are attempting to negotiate agreements with Ameritech Indiana. . . . Ameritech Indiana maintained that it could unilaterally insert new language or revise existing language in a previously approved interconnection agreement when a CLEC seeks to adopt such agreement pursuant to section 252(i) . . . [the state commission staff], the General Counsels' Office, and presiding Administrative law Judges have all explained to Ameritech Indiana numerous times that a CLEC may adopt an existing interconnection agreement by simply submitting a letter to the [state commission]. . . . [B]y using these tactics, [for example], Ameritech Indiana delayed the execution of its interconnection agreement with [a competitive LEC] for almost five months.[13]

In short, the incumbent LECs' claims that the § 252(i) process requires no fine-tuning cannot be reconciled with their own documented conduct.

II. THE COMMISSION SHOULD CLARIFY THAT CONGRESS INTENDED SECTION 252(i) TO BE LARGELY SELF-EXECUTING.

Under the plain terms of the Act, a § 252(i) notification should generally be self-executing: an incumbent LEC "shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement."[14] Section 252(i) provides no role for state commissions in approving opt-in requests; rather, § 252(i) leaves to state Commissions only the "details of the

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[12] *See, e.g.*, CTA, Attachment at 4-5.

[13] *Id.*

[14] 47 U.S.C. § 252(i) (emphasis added).

procedures for making agreements available to requesting carriers on an expedited basis."[15] As noted by many commenters,[16] these procedures include only such requirements as ensuring that previously-approved agreements that are available for opt-in are readily available for review.[17]

A few state commissions and the incumbent LECs suggest that a Commission declaration that clarifies the self-executing nature of § 252(i) requests would somehow usurp the powers of

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[15] First Order and Report, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* CC Docket No. 96-98, FCC Rcd 15499, ¶ 1321 (1996) (*"Local Competition Order").* On at least two separate occasions the Commission has explained that state commission approval pursuant to §252(e) only applies to agreements reached under negotiation or arbitration. *See* Opinion and Order, *Global NAPs, Inc., Petition for Preemption of Jurisdiction of the New Jersey Board of Public Utilities Regarding Interconnection dispute with Bell Atlantic-New Jersey, Inc.,* ¶ 4 ("there is no arbitration or negotiation as identified in section 252(e)(1) for the state to approve") ("Global NAPS Order"); *Local Competition Order,* ¶ 1321 ("the non-discriminatory, procompetition purpose of section 252(i) would be defeated were requesting carriers required to undergo lengthy negotiation and approval process pursuant to section 251").

[16] *See, e.g.,* AT&T at 6-7; Focal Communications at 5-6; CTA at 2-3; Advanced Telecom at 6; Broadspan 4-5.

[17] Several commenters urge the Commission to sanction requirements of state commission approval in the "special case" of a requesting carrier that opts into portions of more than one existing agreement, because "mixing and matching individual provisions from various agreements is not the equivalent of an agreement that has been adopted as a whole." *See* GTE at 3; Comments U S WEST Communications, Inc. at 9 ("U S WEST"), Letter from Lawrence G. Malone, General Counsel of State of New York Department of Public Service, to Magalie Roman Salas, Secretary Federal Communications Commission ("New York"), *Petition for Expedited Declaratory Ruling Regarding the Process for Adoption of Agreements Pursuant to Section 252(i) of the Communications Act and Section 51.809 of the Commission's Rules,* CC Docket No. 00-45 (2000). These commenters can supply no explanation how state commission approval authority could turn on the specifics of an opt-in request, and the proposed exception would swallow the rule. As the Supreme Court has explained, a central purpose of § 252(i) is to allow a carrier to "demand that the LEC make available to it 'any individual interconnection, service, or network element arrangement' on the same terms and conditions the LEC has given anyone else in an agreement approved under § 252(i) – without its having to accept the other provisions of the agreement." *AT&T Corp. v. Iowa Utilities Bd. et al.,* 525 U.S. 366 , 396 (1999).

the state commissions.[18] The short answer to these claims is that § 252(i) creates new *federal* statutory opt-in rights and obligations. And, unlike negotiated and arbitrated interconnection agreements, Congress did not provide for further state commission approval of opt-in agreements. Applying § 252(i) as written thus usurps no state authority.[19]

The incumbent LECs raise three additional objections to the requested clarification that opt-in requests require neither execution of a new contract nor state commission approval. All are meritless. Bell Atlantic (at 1) and SBC (at 17-20) contend that because the Act establishes a "contract-based regime" of interconnection, § 252(i), as a matter of "basic contract law," requires a new contract in writing whenever a requesting carrier opts into all or part of an existing agreement. SBC at 17. A requesting carrier's written request obviously binds that carrier to the terms of the agreement. Assent by the other party, the incumbent LEC, is not required. *See* 47 U.S.C. § 252(i) (incumbent LECs "shall make available" requested agreement terms). This provision of federal law preempts state law pertaining to contract formation.

GTE and other incumbents complain that it is impractical to give immediate effect to an opt-in notice, because there will always be numerous preliminaries to be completed, such as making any necessary physical connections, placing orders, completing tables of contact

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[18] *See, e.g.*, U S WEST at 2-6; Comments of Public Service Commission of Wisconsin at 2-4 ("PSCW").

[19] There can be no serious claim that the Commission lacks authority with respect to rules implementing § 252(i). *Compare AT&T* v. *Iowa Utils. Bd.*, 525, U.S. 266, 377-378 (1999) ("the Commission's rulemaking authority would seem to extend to implementation of the local-competition orders," indeed, "[w]e think that the grant in § 201(b) means what it says: The FCC has rulemaking authority to carry out the 'provisions of this Act,' which include §§ 251 and 252, added by the Telecommunications Act of 1996) *with* PSCW at 6 ("Section 252 does not grant specific rulemaking authority to the FCC to implement the ILEC duty in § 252(i)").

information, and other administrative matters before service can be provided.[20] This argument confuses the effective date of an agreement with the date upon which service is actually provided. That distinction may exist with respect to *any* interconnection agreement, whether adopted by negotiation, arbitration or opt-in. Some requests for interconnection, service, or network elements under an interconnection agreement can be accommodated immediately and some cannot, but that fact in no way justifies delaying altogether the effective date of the agreement – *i.e.*, the date upon which *requests* for service under the agreement can be made. To the extent accommodation of a given request under an effective contract cannot occur instantaneously (because, for example, the order must be provisioned), the incumbent's obligation, as always, is to accommodate the request in a just, reasonable and nondiscriminatory manner consistent with the requirements of the contract.

In this regard, the Commission's existing rule provides that an incumbent LEC "shall make available without unreasonable delay" any interconnection, service or network element in an opt-in situation.[21] The Commission should clarify that the "unreasonable delay" language is designed only to reflect the reality that immediate accommodation of a given request may not be possible, and does not give an incumbent LEC any discretion to delay accepting – and taking reasonable steps to accommodate – requests for service once it receives a notice of adoption.

Finally, SBC claims that there will necessarily be gaps that must be filled with a new writing, because § 252(i) does not authorize a requesting carrier to opt into an entire agreement, but only to individual interconnection, service, and network element arrangements. SBC admits

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[20] *See, e.g.*, GTE at 4; U S WEST at 4-5; Bell Atlantic at 3-4.

[21] 47 C.F.R. § 51.809(a).

that it previously (and wrongly) argued that § 252(i) *only* allows requesting carriers to opt into entire agreements.[22] SBC's new argument is equally flawed. By the plain terms of § 252(i), a requesting carrier may opt into an entire interconnection agreement so long as the agreement's terms relate to "interconnection, service[s], or network element[s]" that the incumbent is providing to another carrier. And in requiring the incumbent to provide the requested interconnection, services and network elements "upon the same terms and conditions as those provided" in the existing agreement, Congress made clear that the obligation extends not just to agreement provisions establishing the general duty to provide interconnection, services or network elements, but to related terms as well, such as penalty, dispute resolution and contract term provisions. Thus, SBC is clearly wrong in claiming that gap-filling will usually be required when a carrier opts into all or part of an existing agreement.

Moreover, the principal example SBC gives of something that is purportedly beyond the scope of § 252(i) – reciprocal compensation arrangements – falls squarely within that provision. Transport and termination, for which reciprocal compensation is required, is plainly a "service" that one carrier provides to another: that is, the service of delivering calls originated by the customers of the originating carrier. SBC claims that "the only reasonable" interpretation of the term "service" is to limit it to services provided for resale pursuant to § 251(b)(4), but Congress included no such limit. To the contrary, the language of the 1996 Act squarely refutes SBC's construction. Section 252(c), "Standards for Arbitration," authorizes state commissions to establish rates for "interconnection, services, or network elements" – the same phraseology used in § 252(i) – "according to subsection (d)." 47 U.S.C. § 252(c). Subsection (d) includes a rate

[22] SBC at 23.

standard for transport and termination separate from the rate standard for interconnection and network elements. Thus, Congress clearly intended the term "service" to encompass the transport and termination service.

Finally, even if the language of the Act did admit of SBC's cramped construction, it would be unreasonable to infer congressional intent to exclude transport and termination from a broad opt-in provision designed to prevent discrimination and speed competitive entry, because interconnecting carriers *always* require transport and termination arrangements. Under SBC's reading of § 252(i), requesting carriers would virtually always incur the negotiation and arbitration costs and delays that § 252(i) was designed to prevent.[23]

III. THE COMMISSION SHOULD CLARIFY THAT AN INCUMBENT LEC CAN RAISE ONLY VERY LIMITED OBJECTIONS TO A PICK-AND-CHOOSE REQUEST.

A wide array of commenters support MCIW's proposal that the Commission clarify that unless an incumbent LEC can prove that permitting a requesting carrier to opt into an existing agreement would be technically infeasible, or that it would cost the incumbent more to provide the terms of the agreement to the requesting carrier than to the original carrier,[24] then the

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[23] In arguing that a carrier should not be allowed to opt into reciprocal compensation arrangements based on another competitive carrier's costs, SBC simply ignores that rates for transport and termination "shall be symmetrical," 47 C.F.R. § 51.711(a), and are generally based on the *incumbent's* costs.

[24] In particular, for an incumbent LEC to establish a proven cost difference, it must prove that its costs of providing the particular, interconnection, service, or network element to the requesting carrier are greater than the *current* costs of providing the terms to the original carrier (as opposed to the costs of providing those items at the time that the agreement was originally reached). *See* 47 C.F.R. 51.809(b)(1) (an incumbent LEC may deny a § 252(i) request if "[t]he costs of providing a particular interconnection, service, or network element to the requesting telecommunications carrier are greater than the costs of providing it to the telecommunications carrier that originally negotiated the agreement"). Where the costs to the incumbent LEC of providing items under an agreement, even to the original carrier, have materially increased since

incumbent LEC must immediately make the requested interconnection, service or element available to the requesting carrier on the same terms and conditions as those provided in the agreement.[25]

A number of incumbent LECs claim that they may also "refuse to make available an interconnection agreement if that agreement is stale – *i.e.*, if a reasonable period of time has expired since that agreement was first made available for public inspection."[26] The incumbents ground their "staleness" theory primarily in Rule 809(c), which requires that incumbent LECs make an agreement available "*for a reasonable period of time* after the approved agreement is available for public inspection under section 252(f) of the Act." 47 C.F.R. § 51.809(c) (emphasis added).

This claim is meritless. As the Commission made clear in the *Local Competition Order*, Rule 809(c) is not a warrant for the incumbents LECs to impose subjective limitation periods on the exercise of competing LECs' rights. Rather, the language in Rule 809(c) requiring that agreements be made available "for a reasonable period" "addresses incumbent LEC concerns over *technical incompatibility*." *Local Competition Order*, ¶ 1319 (emphasis added). Under this Rule, an incumbent may refuse to permit a requesting carrier to opt into an agreement "if the

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the date of the original agreement, it may be reasonable for a state commission, upon adequate proof, to specify that the requested agreement will expire on the same date as the original agreement. The Commission, however, need not address this issue in the current proceeding as this issue is already pending before the Commission. *See* Intercarrier Compensation for ISP-Bound Traffic, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 14 FCC Rcd 3689 ¶ 35 (1999).

[25] *See, e.g.*, AT&T at 7-8; CTA at 6; Advanced Telecom at 17-18; Broadspan at 7; TRA at 1-2; Personal Communications at 7; Focal Communications at 12-13; Global NAPS at 5-7.

[26] SBC at 28; *see also* GTE at 5-7; U S WEST at 6-8; Comments of BellSouth at 4 ("Bell South").

technical requirements of implementing that agreement or term have changed." *Id.* The Commission explained that "this approach makes economic sense since the pricing and network configuration choices are likely to change over time." *Local Competition Order* ¶ 1319.

In other words, Rule 809(c) permits an incumbent to refuse to permit a requesting carrier to opt into an existing agreement only where the incumbent can show that making the agreement available to the requesting carrier would be technically infeasible, or where the incumbent's costs of complying with the agreement have substantially increased since the date the original agreement was executed. Contrary to the ILECs' claims, Rule 809(c) does not create an additional "defense" to an ILEC's refusal beyond those set forth in MCIW's petition.

IV. THE COMMISSION SHOULD CLARIFY ITS RULES REGARDING EXPEDITED PICK-AND-CHOOSE DISPUTE RESOLUTION.

As AT&T demonstrated in its comments, it is critically important that a requesting carrier "be permitted to obtain its statutory [§ 252(i)] rights on an expedited basis."[27] To this end, the Commission urged state commissions in 1996 to implement "procedures for making agreements available to requesting carriers on an expedited basis."[28] Given the incumbent LECs' demonstrated resistance to legitimate § 252(i) requests, further clarification on the subject of expedited dispute resolution processes is essential.

There is a consensus among the commenters, including the incumbent LECs, that expedition is appropriate. As the comments filed in response to MCIW's Petition make clear,

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[27] *Local Competition Order*, ¶ 1321.

[28] *Id.*

however, expedition is currently the exception rather than the rule.[29] The proposal of SBC and others that the Commission merely counsel "expedition" – without providing any specific guidance – has already failed. To alter the status quo, the Commission should urge state commissions to determine within two weeks of a carrier's request for arbitration whether the incumbent LEC has presented a prima facie case, and, even where the incumbent LEC has done so, to resolve all such disputes within 60 days. Where a state commission fails to meet these deadlines, the Commission should invoke its authority under § 252(e)(5) to "assume the responsibility of the State commission . . . and act for the State commission." [30]

V. THE COMMISSION SHOULD REDUCE INCUMBENT LEC INCENTIVES TO RAISE BASELESS OBJECTIONS TO § 252(i) NOTIFICATIONS.

Other commenters also echo MCIW's and AT&T's view that the Commission should take two very simple steps to reduce incumbent LEC incentives to cause delay.[31] First, the Commission should declare that where an incumbent LEC fails to carry its burden of proof in challenging a § 252(i) request, the disputed terms must, at the requesting carrier's election, be deemed effective as of the date that the requesting carrier originally notified the incumbent of the § 252(i) request. At least where payment terms are at issue and the requesting carrier has been able to provide service notwithstanding the pick-and-choose dispute, this rule will prevent the

[29] *See, e.g.*, AT&T at 4-6; CTA at 3-4; Global NAPS at 5-6; Focal at 8-10; Personal Communications at 8-9; Williams at 3-4; Connect at 2-4; TRA at 5-6; Broadspan at 3-4; Advanced Telecom at 10-11.

[30] AT&T at 11 (quoting 47 U.S.C. § 252(e)(5)).

[31] *See, e.g.*, AT&T at 12-13; Personal Communications at 9; Advanced Telecom at 18.

incumbent from directly profiting from its unlawful conduct.[32] Under the proposed rule, all carriers are put on notice prospectively that any services rendered during dispute resolution may be subject to true-up, which distinguishes it from the type of "retroactive" ratemaking condemned by U S West.[33]

The second step that incumbent LECs should take to the reduce incumbent LECs' incentives to cause unneeded delays in implementing § 252(i) requests is to remove incumbent LECs' incentives and ability to delay implementation of an entire interconnection agreement (or portion thereof) by objecting to a different portion. Thus, even where the incumbent does raise a technical infeasibility or cost difference objection to the requesting carrier's opt-in to some terms of an agreement (or portion thereof), the Commission should declare that the incumbent is required to honor the other terms of the agreement that are sought by the requesting carrier during the pendency of the challenge.

US WEST claims that it would be "impossible to honor" some terms absent the additional "terms being challenged."[34] But where an incumbent LEC challenges the technical feasibility of a particular network element arrangement, for example, there is no reason to delay

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[32] *Cf.* Final Arbitration Report, Pacific Bell Telephone Company's (U 1001 C) Petition for Arbitration of Advice Letter No. 58 Filed by TCG-San Francisco (U 5454 C) on November 29, 1999 Regarding TCG-San Francisco's Request to Adopt Section 18 of the Interconnection Agreement between AT&T Communications of California, Inc. (U 5002 C) and Pacific Bell Telephone Company, Application 99-12-017-119 (March 17, 2000) (making the effective date of a decision in favor of a requesting carrier retroactive to the date that the carrier filed advice letters with the state commission notifying the commission (and the incumbent LEC's) of its intent to adopt provisions of another agreement).

[33] *See, e.g., Exxon Company v. Federal Energy Regulatory Commission*, 182 F.3d 30, 47-50 (1999).

[34] U S WEST at 9.

implementation of the § 252(i) request with respect to the other network elements. If there are particular cases in which a challenge to particular terms renders it truly technically infeasible to honor other related terms, the incumbent LEC should include the related terms in its challenge. Consequently, the Commission should grant MCIW's request to declare that even where the incumbent does raise a technical infeasibility or cost difference objection to the requesting carrier's opt-in to some terms of an agreement (or portion thereof), the incumbent is required to honor the other terms of the agreement that are sought by the requesting carrier during the pendency of the challenge.

CONCLUSION

For the foregoing reasons, the Commission should grant MCIW's request for a declaratory ruling.

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CONCLUSION

For the foregoing reasons, the Commission should grant MCIW's request for a declaratory ruling.

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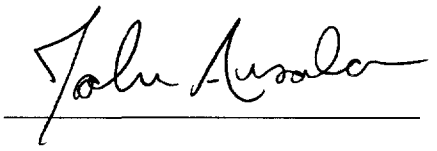
April 11, 2000

CERTIFICATE OF SERVICE

I, John Arsala, do hereby certify that on this 11th day of April, 2000, a copy of the foregoing "Reply Comments of AT&T Corp." was served via first class mail, postage prepaid, to the parties listed on the attached Service List.



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